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Medical Evidence in Wisconsin 1956-1966

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MEDICAL EVIDENCE IN WISCONSIN 1956-1966

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Ten years ago it was suggested by Judge Andrew Parnell that an article be prepared which would serve as a ready reference for the judge sitting on the bench and the trial attorney when confronted with a problem relating to medical evidence. The favorable reception accorded to that article, which appeared in 39 Marquette Law Review 289 (Spring, 1956), has been most gratifying.

Many developments have transpired during the past ten years in the field of medical evidence. These events have prompted the writing of this article which also has been prepared to serve as a ready reference for the judge and the trial attorney. The format adopted in 1956 shall again be followed. This article therefore will in effect serve as a supplement to the 1956 article and cover the period from 1956 to 1966. It is hoped that this article will receive the same favorable reception as did its predecessor.

WHO MAY TESTIFY AS A MEDICAL EXPERT

An objection is frequently urged that questions put to experts and their answers invade the province of the jury. In *Jacobson v. Greyhound Corporation*,[1] the Greyhound Corporation called two county highway commissioners to give expert testimony regarding the proper manner of plowing snow and whether the driver of the county snow plow operated the vehicle at an excessive rate of speed. Greyhound sought to introduce the opinion testimony of the two expert witnesses in the form of answers to hypothetical questions. The trial court rejected the testimony on the ground that it was not a proper subject for expert testimony and that such testimony would invade the province of the jury. The supreme court held that upon the assumption the two witnesses were qualified as experts, an objection upon the sole ground that their opinion would invade the province of the jury should not be sustained.

The court in the *Jacobson* case commented that the court had dealt

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[1] 29 Wis. 2d 55, 138 N.W. 2d 133 (1965).

with the same problem in *Chapnitsky v. McClone.*[2] In that case, the court said:

> Defendant's counsel objected to both questions on the ground that they invaded the province of the jury. The trial court sustained the objections to both questions. Plaintiff contends this ruling constituted prejudicial error. The questions were not objectionable on that ground.[3]

In *Jacobson,* the court stated that a similar issue was recently before the Supreme Court in *Fehrmen v. Smirl.*[4] In that case, the court said:

> It is urged that these questions and answers were incompetent because they invaded the province of the jury. This court, however, is committed to the principle that expert opinion testimony is not objectionable merely because it covers one of the ultimate facts to be determined by the jury.[5]

In support of this holding the court cited a number of earlier Wisconsin cases and 7 WIGMORE, EVIDENCE, (3d ed. 1940) pages 18-20, section 1921.

In *Kreyer v. Farmers' Cooperative Lumber Co.,*[6] also cited in *Jacobson,* the court stated: "Trial courts have wide discretion as to admitting opinion evidence of expert witnesses."[7]

In *Henthorn v. M.G.C. Coop.,*[8] counsel objected to questions addressed to an expert witness upon the ground that they invaded the province of the jury. The supreme court held, contrary to the ruling of the trial court, that this was a field in which trial courts are permitted to exercise fairly wide discretion and that the court did not consider it would be in error to permit a qualified expert to state his opinion relating to the position of two motor vehicle units at the time of impact, based upon such facts as damage to vehicles, position of the units after the accident, marks or absence of marks on the pavement and shoulders.

The decisions cited cover a range of subjects. In *Chapnitsky v. McClone,*[9] the expert witnesses were doctors. In *Kreyer,*[10] the expert was an electrician. In *Henthorn,*[11] the expert was a graduate civil engineer.

The principle which controls whether or not expert opinion evidence should be received is stated in *Anderson v. Eggert,*[12] as follows:

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[2] 20 Wis. 2d 453, 122 N.W. 2d 400 (1963).
[3] *Id.* at 462, 122 N.W. 2d at 405.
[4] 20 Wis. 2d 1, 121 N.W. 2d 255 (1963).
[5] *Id.* at 18, 121 N.W. 2d at 264.
[6] 18 Wis. 2d 67, 117 N.W. 2d 646 (1962).
[7] *Id.* at 75, 117 N.W. 2d at 650.
[8] 1 Wis. 2d 180, 83 N.W. 2d 759 (1957).
[9] *Supra* note 2.
[10] *Supra* note 6.
[11] *Supra* note 8.
[12] 234 Wis. 348, 291 N.W. 365 (1940).

> Whether the testimony was properly received in this case depends upon whether members of the jury having that knowledge and general experience common to every member of the community would be aided in a consideration of the issues by the testimony offered and received.[13]

The test adopted in McCORMICK, EVIDENCE, pages 28-29, section 13, is thus stated:

> First, the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field of calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

One requirement with respect to expert testimony must be rigidly observed; an expert may give an opinion on an issue of ultimate fact, but only on a hypothetical question.

The wide discretion of the trial court, in permitting the introduction of expert testimony, is well-illustrated in three recent decisions. In *McDonald v. Bituminous Casualty Corp.*[14] the court upheld the admission of testimony of a man who was skilled in felling trees. His testimony was to the effect that where a tree is notched in preparation for felling it with a saw, the tree is likely to fall in the direction the notch points. Undoubtedly many of the jurors were familiar with this phenomenon, but the supreme court had no difficulty in sustaining the trial court's decision.

In *Wojciuk v. United States Rubber Co.*,[15] the plaintiff attempted to introduce in evidence expert testimony of a man who held the degrees of Master and Doctor of Science in Engineering. The trial court refused to permit the introduction of expert testimony relating to alleged defects in automobile tires. This refusal of the trial court was bottomed upon the expert witness's lack of experience with automobile tires. The supreme court sustained the decision of the trial court upon the ground that there was no abuse of discretion. At the same time, the supreme court emphasized that practical experience was not always essential in the qualification of an expert witness.

Another illustration of permissible exercise of discretion by the trial court is found in *Frion v. Coren.*[16] In that case the court rejected the testimony of architects that a railing from which the plaintiff fell was not safe. The supreme court held, upon the authority of *Henthorn*[17] that the trial court was permitted great latitude in determining whether expert opinion testimony should be received. The offer of

[13] *Id.* at 361, 291 N.W. at 370.
[14] 11 Wis. 2d 202, 105 N.W. 2d 312 (1960).
[15] 19 Wis. 2d 224, 120 N.W. 2d 47 (1963).
[16] 13 Wis. 2d 300, 108 N.W. 2d 563 (1961).
[17] *Supra* note 8.

proof which was quoted in the supreme court opinion clearly justified the action of the trial court in rejecting the testimony.

Two recent cases, not cited in *Jacobson*,[18] follow *Anderson v. Eggert*.[19] These are *State v. Schmear*,[20] involving the testimony of a crime-lab technician who testified as to stains on certain items of clothing worn by the defendant and on the clothing worn by the complaining witness in an assault and battery case; and *Schmidt v. Chapman*,[21] involving the expert testimony of a building inspector for the City of Milwaukee, a supervisor in the office of the building inspector and a university graduate with course work in the composition of soils.

In the light of the specialties in the field of medicine, *Riehl v. De Quaine*[22] presented a question which probably will arise with increasing frequency in the future. In this personal injury action Dr. Caffrey testified that the plaintiff's condition was: "psycho-neurotic anxiety reaction with a traumatic neurosis, compensation neurosis, in a narcissistic immature individual . . ."[23] The prognosis of the doctor was that the plaintiff was a poor candidate for psychotherapy as long as her case was pending. The doctor's conclusion was that the plaintiff's psychoneurotic depression has incapacitated her from work, was permanent, and was causally connected with the accident.

Dr. Quade, who was a specialist in neurological surgery, examined the plaintiff for the defendants and testified as a medical expert. His diagnosis was a central nervous system objectively normal, subjective nervousness and psychoneurosis. It was this doctor's opinion that the psychoneurosis was not traumatic in nature. Dr. Quade's opinion was that the plaintiff attributed all of her condition to the accident because she was searching for a reason to justify the existence of such a condition, *i.e.*, "to find a scapegoat." It was apparent from the award of damages by the jury that it concluded that neurosis was not caused by the accident.

The court, in holding that there was no gradation of experts based on specialized training or practice, said:

> Counsel for plaintiffs argue that Dr. Caffrey's expert testimony as a psychiatrist should carry more weight than Dr. Quade's expert testimony as a neurosurgeon. The law, however, does not recognize any gradation of experts based on specialized training or practice. So long as a physician qualifies as an expert the weight to be accorded his testimony is for the jury.[24]

[18] *Supra* note 1.
[19] *Supra* note 12.
[20] 28 Wis. 2d 126, 135 N.W. 2d 842 (1965).
[21] 26 Wis. 2d 11, 131 N.W. 2d 689 (1964).
[22] 24 Wis. 2d 23, 127 N.W. 2d 788 (1964).
[23] *Id.* at 31, 127 N.W. 2d at 792.
[24] 24 Wis. 2d at 32, 127 N.W. 2d at 793.

It is suggested that the time has come when we should begin to consider the qualification of an expert in a particular medical field to testify as a medical specialist. The question of the competency of a psychologist to testify as a medical expert was presented in *Casimere v. Herman.*[25] In that case Delores Casimere brought a personal injury action against Herman and his insurer for injuries sustained in an automobile accident in Milwaukee in March of 1962. The jury found the wife of the defendant and driver of the automobile ninety (90%) per cent causally negligent and the plaintiff ten (10%) per cent causally negligent. The jury awarded the plaintiff a total of $9,650.00. The dispute giving rise to the appeal related to the portions of the award amounting to $2,500, for loss of earnings, and $4,500, for future pain and suffering.

The plaintiff was treated by her personal physician, Dr. Henry L. Dale, a general practitioner, and Dr. James Groh, an orthopedic surgeon. She also consulted Dr. Baker, who was the head of a psychiatric clinic and Dr. Walter McDonald, a clinical psychologist and a member of Dr. Baker's clinic. Drs. Dale, Groh and McDonald testified, but Dr. Baker was not called, although he was available.

The defendant argued that Dr. McDonald, who was a psychologist and not a doctor of medicine, was not competent to testify in support of an award for future pain and suffering. The defendant insisted that the question of future pain and suffering was a medical one and that only a witness holding a medical degree and license under the Laws of the State of Wisconsin was competent to testify. Reliance was had upon the language used in *Diemel v. Weirich.*[26] In that case the court held that only a medical expert was qualified to express an opinion to a reasonable medical certainty or reasonable medical probability whether pain would continue in the future and, if so, for how long. In the absence of such expert testimony, no damages could be allowed for future pain and suffering.

The plaintiff distinguished *Diemel v. Weirich* and the many cases which have followed that decision, some of which are cited in a footnote in *Casimere,*[27] by pointing out that they concern testimony of a non-expert layman as contrasted to the testimony of a licensed physician. In short, the plaintiff claimed that the rule was not applicable where an expert in the case is a clinical psychologist. In support of her position, the plaintiff cited section 147.14(2)(b) of the Wisconsin Statutes which permits any person to testify as an expert on a medical subject

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[25] 28 Wis. 2d 437, 137 N.W. 2d 73 (1965).
[26] 264 Wis. 265, 58 N.W. 2d 651 (1953).
[27] 28 Wis. 2d at 437, 137 N.W. 2d at 77.

in any action or judicial proceeding where proof is offered satisfactory to the court that such a person is qualified as an expert.

The plaintiff attempted to qualify McDonald as an expert by establishing his extensive educational background in psychology, his holding a doctorate in the subject of psychology, and his practicing as a clinical psychologist for a number of years. McDonald's qualifications to testify were not challenged by the defendant until after the verdict.

The plaintiff, in attempting to prove that the court had previously accepted the testimony of a psychologist alone, cited *Alsteen v. Gehl*,[28] where the court said:

> Psychiatry and clinical psychology, while not exact sciences, can provide sufficiently reliable information relating to the extent of psychological stress, and to the causal relationship between the injury and the defendant's conduct, to enable a trier of fact to make intelligent evaluative judgments on a plaintiff's claim.[29]

The defendant did not deny the competence of the psychologist to testify as an expert, but insisted that his testimony as an expert on medical matters relating to the tests he conducted were mainly tools to be used by a licensed psychiatrist to make his findings more objective. Of themselves and without the aid of the medical expert, the defendant contended, the tests were insufficient to support an award for future pain and suffering.

The court stated the posture of the case to be as follows:

> Suffice it to say that the arguments posed by the parties point up serious questions regarding the competence of a psychologist to testify as to future pain and suffering or in regard to other aspects of a personal-injury case having medical implications when that testimony is not used as an adjunct to the testimony of a licensed physician or psychiatrist.[30]

Historically, the court noted, the qualifications of an expert witness had not been a matter of license but a matter of experience. To illustrate its point, the court commented on the admissibility of the testimony concerning the condition of dead bodies by a non-medical coroner who was permitted to give his opinion as to the time of death.[31] The court has also allowed the testimony of lay witnesses that an applicant for a life insurance policy was, apparently, in good health.[32]

In *State v. Law*,[33] also cited by the court, three professors of the University of Wisconsin Medical School, none of whom were licensed to practice in the state as physicians, were permitted to testify as

[28] 21 Wis. 2d 349, 124 N.W. 2d 312 (1963).
[29] *Id.* at 359, 124 N.W. 2d at 317.
[30] 28 Wis. 2d at 441, 442; 137 N.W. 2d at 75.
[31] Citing Palmer v. Schultz, 138 Wis. 445, 120 N.W. 348 (1909).
[32] Stanislawski v. Metropolitan Life Ins. Co., 231 Wis. 572, 286 N.W. 10 (1939).
[33] 150 Wis. 313, 136 N.W. 803 (1912).

expert medical witnesses that the abdominal cavity of a deceased abortion victim contained, "bacteria known as strepptococcus," and that the deceased was five or six weeks pregnant at the time of her death. The court, in that case, said:

> The mere fact that the science of medicine covers, includes, or requires some knowledge of bacteriology, or chemistry, or botany, or biology, or embryology would not exclude an expert in either of these sciences. . . .[34]

It was held in 1863, in *Evans v. People*,[35] that during periods of epidemics when lay persons were extensively exposed to disease, that lay persons were competent to testify in regard to particular diseases with which they were familiar.

The court, in Casimere, might have cited *Milwaukee v. Antczak*,[36] and *Milwaukee v. Johnston*,[37] where laymen were permitted to testify as to intoxication. In *Odya v. Quade*,[38] an 18 year old nurse's aide was held competent to testify to intoxication but was held not competent to testify as to shock. In *Cullen v. State*,[39] lay witnesses were permitted to testify that, in their opinion, they saw blood stains. The court applied the analogy of admissibility of opinion evidence with respect to intoxication. In *Lubner v. Peerless Insurance Co.*,[40] a competent medical expert testified that the cause of death could not be determined by performing a certain test on a dead body. There was nothing in the testimony of the expert which was inherently improbable. The court held that the testimony of a layman that he determined the cause of death by the same type of test was not competent evidence to go to the jury on that issue. *Lubner* was a case involving an alleged death by drowning. The court carefully limited the scope of its opinion by making it clear that the court did not decide death by drowning never could be established by lay testimony. It was pointed out that anyone is competent to testify to a drowning which he actually witnessed. The court further suggested that drowning can be proved by circumstantial evidence, such as the finding of an overturned boat, in which the person claimed to have drowned was an occupant and later the discovery of the body itself.

The cases cited indicate that the law traditionally permitted limited testimony of a medical nature by one not licensed as a medical doctor if he was in fact qualified as an expert. The court, in *Casimere*, suggested that even a cursory study of the literature relating to mental

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[34] *Id.* at 328, 136 N.W. at 808.
[35] 12 Mich. 27 (1863).
[36] 24 Wis. 2d 480, 129 N.W. 2d 125 (1964).
[37] 21 Wis. 2d 411, 124 N.W. 2d 690 (1963).
[38] 4 Wis. 2d 63, 90 N.W. 2d 96 (1958).
[39] 26 Wis. 2d 652, 133 N.W. 2d 284 (1965).
[40] 19 Wis. 2d 364, 120 N.W. 2d 54 (1963).

conditions reveals that there are those who question whether all aspects of abnormal behavior are, in fact, medical problems in the traditional sense. In commenting upon the difference of opinion in regard to the legitimate area of influence of the psychologist, the court said:

> Considering the recent origins of psychology and psychiatry, it is not surprising that there is a sharp difference of opinion in regard to where the expertise of the psychologist impinges on the exclusive domain of the psychiatrist.
>
> It is therefore little wonder that the courts have been reluctant in allowing, and generally are adamant in refusing to allow, a psychologist to "go it alone" as a witness in what might be the realm of medicine.[41]

The court did not find it necessary to decide the status of a psychologist as a witness and on this point said:

> However, to decide the case before us, we are not obliged to explore the penumbra of the psychologist's expertise where some members of this court have grave doubt as to such testimonial competence on the part of a clinical psychologist.[42]

In *Casimere,* it appears from the record that only testimony in regard to future pain and suffering or future disability was elicited from Dr. McDonald by the plaintiff's attorney. Upon the hypothesis that Dr. McDonald was a qualified witness, the court held that his testimony failed to meet the standard of medical certainty required by the court. Although no particular words of art were held to be necessary to express a degree of medical certainty required to sustain an award for future pain and suffering, it was necessary that a reasonable interpretation of the experts' word show more than a mere possibility or conjecture. The testimony of Dr. McDonald, that it was "quite possible" that the disability would persist for the lifetime of the plaintiff, did not meet the standards required. True, Dr. McDonald did use the phrase "likely to persist" and that the condition would "very probably" persist, but the probative effect of such testimony was substantially impaired by Dr. McDonald's statements which were inconsistent with the foregoing testimony. Dr. McDonald testified that if Miss Casimere were working her condition would improve; that he had not seen the plaintiff, except for brief intervals before the trial, and as the result of such meeting he was not able to assess whether she suffered from emotional disturbance at the time he saw her. Dr. McDonald further testified that the disability would persist as long as treatment was not instituted from which it might be concluded that the condition, if treated, was curable. The posture of the case was such that the jury could not find to a reasonable degree of medical

[41] 28 Wis. 2d at 443, 137 N.W. 2d at 76.
[42] *Id.* at 444, 137 N.W. 2d at 77.

certainty or probability that the injury would be permanent or the extent of future disability or pain and suffering. Lastly, the court commented upon the absence from the record of any evidence showing an attempt on the part of the plaintiff to mitigate damage by undergoing the treatment allegedly required to cure or ameliorate her mental problem. Bearing on this subject, Dr. Groh testified that the plaintiff admitted she did not take the prescribed course of exercises designed to alleviate her back pains which, allegedly, became acute after the accident and which, Dr. Groh concluded, were postural in origin. Notwithstanding the principle that no injured person is required to undergo surgery or treatment which is hazardous or unduly expensive, such injured person is required to seek medical care and follow the advice of the physician consulted in order to alleviate an injury.[43] A defendant, however, cannot be expected to pay for a lifetime's disability or pain if proper medical treatment or psychotherapy can reasonably correct plaintiff's ailments. The record in *Casimere* was silent with reference to the probable duration of treatment or its cause. The court therefore concluded that the evidence was insufficient to sustain an award of any damages for future pain and suffering or for permanent or future disability.

THE DEMISE OF KATH V. WISCONSIN CENTRAL R. CO.

For many years one of the difficulties inherent in the trial of a personal injury action related to the testimony of an expert medical witness which consisted, in part, of subjective symptoms given by the patient. In *Kath v. Wisconsin Central R. Co.*,[44] the court stated that in *Keller v. The Town of Gilman*,[45] there was an attempt made to formulate the rules governing the admission or rejection of evidence as to subjective symptoms of a patient in a way which should cover all cases. The court in *Kath*, however, observed that the attempt was futile and that "the present contention shows how futile the attempt was." In *Keller*, the court stated that evidence of subjective symptoms might be introduced in evidence when made to a physician for the purpose of treatment but could not be admitted when made to an expert after an action was brought in order to enable him to testify as a witness at the trial. The court, in *Kath*, further observed that the rule seemed to be clear enough "until a case is presented like the present, where the statements are made both for the *bona fide* purpose of treatment and to enable the physician to testify as an expert on the trial." On principle, the court thought such testimony should not be admitted. It seemed to the court that there was no difference between the intro-

[43] Collova v. Mutual Service Casualty Ins. Co., 8 Wis. 2d 535, 99 N.W. 2d 740 (1959).
[44] 121 Wis. 503, 99 N.W. 217 (1904).
[45] 93 Wis. 9, 66 N.W. 800 (1896).

duction in evidence of subjective symptoms when made to a doctor both for the purpose of treatment and for trial and statements made to a physician for the sole purpose of enabling the witness to testify as an expert.

There was an attempt to erode the principle of the *Kath* case in *Schields v. Fredrick.*[46] In that case the court held that ordinarily the opinion of a physician based upon subjective symptoms related to him by the injured during the course of an examination by him, for the purpose of testifying rather than for the purpose of treatment, was not admissible in evidence. The plaintiff conceded the rule but sought to avoid the effect of the admission of hearsay testimony on the plea that the person whose injury was being inquired into testified to the facts stated by the physician on which he based his opinion relating to the nature and extent of the plaintiff's injuries and, therefore, the admission of such evidence was not prejudicial. The court, however, could not find that the testimony supporting the contention was in the record.

In *La Fave v. Lemke,*[47] La Fave's doctor testified that La Fave told him he wanted attention because his back and leg hurt. The court held there was no error because the statement was no more than a direction of the doctor's attention to the parts of the body to be examined. The examination produced a wealth of objective facts confirming the presence of pain and the doctor's expert opinion concerning it. There was no reception of hearsay evidence such as was held objectionable in the *Schields* case, or in *Kath.*

In *Michalski v. Wagner,*[48] the trial court sustained an objection to any testimony of the plaintiff's doctor relating to subjective symptoms communicated by the plaintiff to the doctor. The basis of the objection was that such statements by the plaintiff to the doctor were self-serving declarations made after the plaintiff consulted an attorney. In sustaining the objection, the trial court relied on *Kath.* The plaintiff contended the trial court committed error because the plaintiff's statements of subjective symptoms were obtained by the doctor in order for him to properly treat the plaintiff. The defendants urged that the plaintiff was precluded from raising the objection because of his failure to present the question in his motions after verdict. Upon that ground, the court sustained the position of the defendant. There was an overtone in the opinion which might be interpreted as a tendency on the part of the court to otherwise sustain the plaintiff's position.

In *Powers v. Allstate Ins. Co.,*[49] Drs. Verdone and Ansfield were

[46] 232 Wis. 595, 288 N.W. 241 (1939).
[47] 3 Wis. 2d 502, 89 N.W. 2d 312 (1958).
[48] 9 Wis. 2d 22, 100 N.W. 2d 354 (1960).
[49] 10 Wis. 2d 78, 102 N.W. 2d 393 (1960).

employed after suit was commenced for the purpose of giving testimony, rather than treatment. Dr. Verdone based his opinion partly on subjective symptoms and Dr. Ansfield's estimate of disability was based entirely on the subjective complaints of the plaintiff. The court repeated the principle laid down in *Schields,* but indicated that the weakness of the contention of the defendants, that the testimony was not admissible lay in the failure to object to the testimony at the time it was introduced. It also appeared that Dr. Ansfield's testimony with respect to five (5%) per cent disability of the plaintiff and the factors upon which he based his opinion, together with his opinion that there would be no future change in the condition of the plaintiff's knee, was part of his testimony on direct examination, when he was being examined by the defendant's counsel. The court then characterized the rule of the *Schields* and *Kath* cases as one which was restricted to the admissibility of evidence only and that once opinion evidence based upon subjective symptoms got into the record without objection, it might be considered by the jury in arriving at their verdict.

In *Thompson v. Nee,*[50] the court held that *Kath* did not over-rule *Keller v. The Town of Gilman.*[51] In the *Keller* case the court held that statements of subjective symptoms might be given in evidence when made to a physician for the purpose of treatment but not when made to an expert after action was brought to enable the doctor to testify as a witness at the trial. The court, in *Thompson,* held that the record did not present a situation as in *Kath,* where the doctor was retained for the dual purpose of providing medical expert testimony. The court made the point that if the physician is originally employed solely for the purpose of treatment it was immaterial that thereafter the injured person might have retained an attorney.

The decision in *Thompson* was foreshadowed in *Rasmussen v. Metropolitan Casualty Ins. Co.*[52] The court there held the fact that a person had retained counsel in relation to a possible lawsuit growing out of the injury producing event before consulting a physician did not, in and of itself, support an inference that the plaintiff sought an objective other than treatment when he consulted the physician.

In *Plesko v. Milwaukee,*[53] the plaintiff related subjective symptoms to Dr. Montgomery, both in connection with his treatment and also the day before trial. The plaintiff had retained an attorney before he saw Dr. Montgomery. The court held that the fact that the plaintiff had consulted Dr. Montgomery for treatment *after* she had retained an attorney was not controlling. The court, however, did hold that the

[50] 12 Wis. 2d 326, 107 N.W. 2d 150 (1961).
[51] *Supra* note 45.
[52] 264 Wis. 432, 59 N.W. 2d 457 (1953).
[53] 19 Wis. 2d 210, 120 N.W. 2d 130 (1963).

subjective symptoms related to Dr. Montgomery the day before trial, were inadmissible because of the proximity of the doctor's report to the trial.

In *Ritter v. Coca-Cola Co.*,[54] the erosion of *Kath* became complete and, thereafter, *Kath* ceased to have vitality. In *Ritter* the court reviewed a number of the decisions following *Kath* and stated that the holding in *Kath* had been retained while at the same time a doctor was allowed to testify to a patient's subjective symptoms recited to him during a consultation. Such a consultation may have been arranged for a two-fold purpose of treatment and examination before testimony, or the court may have ruled that the sole motivation of the plaintiff in arranging for the consultation was treatment. The court then administered the *coup de grace* to *Kath*:

> We see no logic in continuing adherence to the *Kath* rule and conclude that if the trial court determines that a consultation is made by a claimant with a physician for the *bona fide* purpose of treatment, the fact that the claimant also desires to utilize the physician as a witness on the trial in relation to his injury will not preclude the physician from testifying as to the patient's report of his subject symptoms or from predicating medical conclusions upon such reports.
>
> Such a change in the *Kath* rule simply recognizes the realities of modern medical practice in the clinical diagnosis of a patient's condition alleged to be due to the injury causing event and prescribing treatment to such condition. Every physician consulting with the patient who is alleged to have been injured takes the patient's history and makes his diagnosis based not only on his objective findings made on examination, but also with due regard to the statements made by the patient both as to his history and as to his subjective complaints. The physician brings to the diagnosis his clinical evaluative skills, which he has acquired through rigorous professional training and extensive clinical experience.
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> The rationale of the *Kath* rule regards statements made by the patient to the physician as hearsay and in the nature of self-serving declarations. *Kath* allows testimony concerning such statements where made to a physician while undergoing treatment, but excludes the testimony where dual motivation is established. This distinction is unrealistic. If the testimony on statements made in one context is admissible then logically such testimony should also be admissible where the statements are made in the other context.
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> As long as a patient goes to a physician with the *bona fide* purpose of receiving treatment, the basic desire of a patient to get well, we believe, will generally motivate him to tell the truth and this is sufficient reason to allow the attending physician to testify about statements made to him which may

[54] 24 Wis. 2d 157, 128 N.W. 2d 439 (1964).

> touch on his history and his subjective symptoms. Cross-examination and argument are available to opposing counsel as a means of testing such testimony.[55]

One further observation is appropriate in connection with *Ritter*. In a footnote, the court said that "The physician may nevertheless give his medical opinion on the basis of a proper hypothetical question, which is predicated on the subjective symptoms if such have been put in evidence by the direct testimony of the claimant."[56] The plaintiff thus has the tools at hand upon which to predicate an expert medical opinion on subjective symptoms. Such symptoms may all be incorporated in a hypothetical question with the result that the jury will be informed of the expert's opinion.

In *Felkl v. Classified Risk Ins. Corp.*,[57] the treating doctor in a personal injury case sent his patient to Dr. Salinsky, a specialist in orthopedics, for diagnosis. Dr. Salinsky examined the plaintiff, took x-rays and made a report to the treating doctor. The treatment was prescribed directly by the treating doctor, who saw the plaintiff frequently. The court permitted Dr. Salinsky to testify concerning the history given by the plaintiff and the plaintiff's subjective complaints. The defendant objected to Dr. Salinsky's testimony on subjective matters because he was an examining doctor and not a treating doctor. The defendant made no effort to show that the plaintiff went to Dr. Salinsky for the purpose of enabling Dr. Salinsky to testify in the action. The court concluded, therefore, that under the decision in *Ritter*, Dr. Salinsky's testimony was properly admitted.

The final chapter, of course, has not been written in connection with subjective symptoms, but in *Wegerer v. Koehler*,[58] the trial court concluded that Dr. Salinsky's services were procured exclusively for the purpose of his giving testimony. Since Dr. Salinsky did not purport to treat any of the plaintiffs, he was not entitled to testify to subjective symptoms under the principle established in *Ritter*.

To What Degree of Definiteness Must the Testimony of a Medical Witness Conform in Order to Be Admissible

At the threshhold of the discussion, three decisions of the Wisconsin Supreme Court should serve to chart the path of admissibility of the testimony of medical experts. The leading case is *Hallum v. Omro*.[59] Two additional cases serve as a prelude to the discussion which follows: The dissenting opinion of Mr. Justice Currie, in *Miller Ras-*

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[55] *Id.* at 164, 128 N.W. 2d at 443.
[56] 24 Wis. 2d at 163, 128 N.W. 2d at 442.
[57] 24 Wis. 2d 595, 129 N.W. 2d 222 (1964).
[58] 28 Wis. 2d 241, 137 N.W. 2d 115 (1965).
[59] 122 Wis. 337, 99 N.W. 1051 (1904).

mussen Ice & Coal Co. v. Industrial Comm.,[60] and *State v. Industrial Comm.*[61] These decisions unmistakably lay down the rule that the testimony of a medical expert must be to a reasonable medical certainty or a reasonable medical probability. Speaking generally, it may be said that the supreme court has followed *Hallum*,[62] but the rule has been stated in substantially the same manner, but with different terminology.

In *Molinaro v. Industrial Comm.*,[63] the court held that an award of the Industrial Commission could not be based upon possibilities. In this case, the applicant contended that she sustained an injury from a falling shoe and last, which combination weighed around 2½ pounds. The doctor testified that there was only a remote possibility that the falling shoe caused the injury. In *Shymanski v. Industrial Comm.*,[64] the term "perhaps" used by a doctor connoted possibility rather than probability. The court held that an award of the Industrial Commission could not be sustained upon such testimony.

Smee v. Checker Cab Co.,[65] was a case involving a brain injury. The plaintiff testified that he had had headaches over a four year period following the accident. This was consistent with the medical testimony that concussions cause head pain and that such pain may persist for some time. The court observed that the statements of the plaintiff were not entitled to great weight, especially when unsupported by medical testimony which, in this case, the court described as "sketchy." Nevertheless, the court held that the medical testimony was sufficient to support an inference that the accident caused frequent headaches.

In *Meyer v. Fronimades*,[66] evidence of persistent headaches consisted entirely of plaintiff's subjective statement. The doctor's testimony, based upon a mere "possibility" that the headaches resulted from the injury, was held by the court to have no probative value.

In *Sawdey v. Schwenk*,[67] the court, following *Diemel v. Weirich*,[68] held that future medical expense must be supported by expert medical testimony. The court did not pass upon the question whether future medical expense must be established by dollars and cents. In *Sawdey*, the maximum expense which it was anticipated would be required was supported by the evidence. In this case there was competent medical testimony to indicate permanent disability of 20% to 25% of the body as a whole.

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[60] 263 Wis. 538, 57 N.W. 2d 736 (1953).
[61] 272 Wis. 409, 76 N.W. 2d 362 (1956).
[62] *Supra* note 59.
[63] 273 Wis. 129, 76 N.W. 2d 547 (1956).
[64] 274 Wis. 307, 79 N.W. 2d 640 (1956).
[65] 1 Wis. 2d 202, 83 N.W. 2d 492 (1957).
[66] 2 Wis. 2d 89, 86 N.W. 2d 25 (1957).
[67] 2 Wis. 2d 522, 87 N.W. 2d 500 (1958).
[68] *Supra* note 26.

In the much-cited *Kowalke v. Farmers Mut. Automobile Ins. Co.*,[69] the court held that the testimony of Dr. Huth that "All I can say is there is a possibility," that an arthritic condition had been aggravated was not sufficient to sustain a jury's award for permanent disability. It appeared, however, that another doctor who examined the patient a week before the trial testified that, in his opinion, to a reasonable medical certainty, the accident did aggravate the pre-existing osteo-arthritic condition, "and may even be permanent." The court held that it was for the jury to determine the weight to be given to the conflicting opinion.

In *Johnson v. Industrial Comm.*,[70] the court held that the testimony of a doctor must be to a medical certainty or at least to reasonable medical probability.

In *Rudy v. Chicago, M., St. P. & P. R. Co.*,[71] the medical testimony did not establish a probability of source of infection but such source was left in the realm of speculation. Consequently, the testimony was inadmissible.

Puhl v. Milwaukee Automobile Ins. Co.,[72] was an action by a mongoloid for damages sustained in the pre-natal period and while the child was nonviable. In this case there was conflicting testimony by the experts. It was contended that the trauma resulting from an automobile accident caused the mongoloid birth. However, it appeared that under one theory of mongolism, it was possible that the mother was so injured so as to cause the birth of a mongoloid. It also appeared from the medical testimony that there are causes of mongolism not known to medical science. The court held that there was not sufficient medical evidence to sustain an award in favor of the mongoloid.

In *Unruh v. Industrial Comm.*,[73] Dr. Ansfield's testimony was prefaced by the words, "feel" or "felt." The court stated that it had not previously passed on the question, although it had accepted "liable," "likely," and "probable" as words connoting reasonable probability as opposed to a possibility. The court also commented that it had rejected the word "perhaps" and "impressions" amounting to "might be." Dr. Ansfield's testimony was held to be sufficiently definite. In *Michalski v. Wagner*,[74] the court held that medical testimony to a "possibility" was not sufficient. *Wright v. Industrial Comm.*,[75] was a case where the medical experts testified that, in their opinion, the incident "could have" produced a brain condition. The court held that the testimony ex-

[69] 3 Wis. 2d 389, 88 N.W. 2d 747 (1958).
[70] 5 Wis. 2d 584, 93 N.W. 2d 439 (1958).
[71] 5 Wis. 2d 37, 92 N.W. 2d 367 (1958).
[72] 8 Wis. 2d 343, 99 N.W. 2d 163 (1959).
[73] 8 Wis. 2d 394, 99 N.W. 2d 182 (1959).
[74] 9 Wis. 2d 22, 100 N.W. 2d 354 (1960).
[75] 10 Wis. 2d 653, 103 N.W. 2d 531 (1960).

pressed a mere possibility which was insufficient to sustain a finding in favor of the applicant.

In *Hintz v. Mielke,*[76] it was contended that atrophy of the plaintiff's brain resulted from his injury. There was conflicting medical testimony, Dr. Henry Suckle, a neurosurgeon, testified that the atrophy of the cerebellum resulted from the accident. Dr. R. H. Quade testified that he was of the opinion the accident could not possibly have caused the changes. The jury found that the accident did not cause the atrophy and judgment was, therefore, entered in favor of the defendant.

In *Freven v. Brenner,*[77] the testimony of a doctor that the accident could have produced a hearing loss was held not to be equivalent to reasonable certainty and was, therefore, inadmissible.

In *Engstrom v. Dewitz,*[78] the court held that there was no evidence to support a finding that the accident caused the injury where one of the doctors testified that it was a "mere possibility" that the accident caused the injury.

In *Rogers v. Adams,*[79] the doctor was *not* asked whether, in his opinion, the back condition of the plaintiff was permanent. The court commented that the doctor did testify as to acceleration of the osteoarthritic process in the plaintiff's back which would probably continue in the future. The court reasoned that if the accident accelerated and activated the osteoarthritic condition so as to prevent the plaintiff from doing heavy manual work even at the time of the trial, the continuance of such acceleration of the degenerative process was probable in the future. The court, therefore, concluded that the testimony would support a conclusion by the jury that the plaintiff's injuries resulted from the accident and that the injury would probably prevent him from doing heavy work in the future.

In *Bleyer v. Gross,*[80] the court reiterated what was said in *Sawdey,*[81] that future medical expense must be supported by competent medical evidence. In *Bleyer,* it was contended that the medical evidence was insufficient to sustain a judgment in favor of the plaintiff, but the court held that the expert testimony adduced was not in terms of "possibilities" but rather in terms of "probabilities."

In *Perlson v. Dairyland Mut. Ins. Co.,*[82] the plaintiff was in an automobile accident in 1955. As a result of the symptoms which developed, an operation was performed between the fourth and fifth lumbar vertebra and an intervertebral disc was removed. In 1958, the

[76] 15 Wis. 2d 258, 112 N.W. 2d 720 (1961).
[77] 16 Wis. 2d 445, 114 N.W. 2d 782 (1962).
[78] 18 Wis. 2d 421, 118 N.W. 2d 710 (1963).
[79] 19 Wis. 2d 141, 119 N.W. 2d 349 (1963).
[80] 19 Wis. 2d 305, 120 N.W. 2d 156 (1963).
[81] *Supra* note 67.
[82] 23 Wis. 2d 391, 127 N.W. 2d 69 (1964).

plaintiff was in another automobile accident. In 1961, another operation was performed for a "recurrent herniated disc and a herniated disc below the fifth lumbar vertebra." In 1962, a spinal fusion operation was performed from the fourth lumbar to the sacrum. One of the doctors testified, over objection, that in his opinion the 1958 accident was "a factor in lighting up his [plaintiff's] symptoms and reinjuring the disc," and that "the accident was a factor in producing the second herniation and therefore there is a relationship between whatever results permanently and that accident." The court suggested that the opinions expressed in terms of a reasonable degree of medical probability were sufficient to support a jury finding. It appeared undisputed that in 1957 two of the doctors found that the plaintiff was 25% disabled from the 1955 accident. The doctors proceeded upon the assumption that an intervertebral disc can be regenerated. Notwithstanding the assumption, the court in *Perlson*[83] held that the testimony of the doctors was sufficient to sustain a finding that the 1958 injury resulted in a reherniation of the intervertebral disc between L 4 and L 5.

In *Olson v. Siordia,*[84] a doctor testified that the fracture sustained by one of the plaintiffs "could very well have been caused as a result of the automobile accident." The court concluded that the testimony of the doctor regarding the causal connection between the fracture and the accident was stated in terms of a reasonable medical certainty, notwithstanding the fact that the doctor used the words, "could very well have." This is contrary to the *Wright*[85] and *Freuen*[86] decisions.

An attempt has been made to analyze all of the decisions relating to the sufficiency of medical testimony to sustain a finding of disability, future pain and suffering and medical expense. The decisions indicate that, generally speaking, the testimony should be to a reasonable medical certainty or reasonable medical probability. The court, however, does not base its decisions on semantics but upon the reasonable interpretation of the opinions of the doctors. If it reasonably appears that the opinion expressed is in the realm of reasonable medical certainty or reasonably medical probability, the testimony of the doctor will support an Industrial Commission finding or a jury verdict. On the other hand, if the tenor of the testimony leaves the impression that the testimony of the doctor is in the realm of possibility or speculation, the testimony of the doctor will be held to be insufficient.

Waiver of Physician-Patient Privilege

In 39 Marquette Law Review 289, 308, the physician-patient privilege was discussed and the following statement was made: "It should

[83] *Ibid.*
[84] 25 Wis. 2d 274, 130 N.W. 2d 827 (1964).
[85] *Supra* note 75.
[86] *Supra* note 77.

be noted in passing that when the injured party puts a medical witness on the witness stand, the privilege conferred by section 325.21 no longer exists." The decision in *Cretney v. Woodmen Accident Co.*,[87] was cited as authority for the statement. In the recent case of *Alexander v. Farmers Mut. Automobile Ins. Co.*,[88] the court cited, with approval, the decision in *Cretney*:

> It would be most unjust and unfair to permit patients or their heirs to waive the privilege as to testimony of a physician who was favorable to their interest and claim the benefit of the privilege as to a physician similarly situated who might not be favorable to their interest. When consent is given for the disclosure by one physician the reason for the statute no longer exists, and the waiver is a waiver of the whole privilege and not a consent to the introduction of the testimony of designated witnesses.[89]

The court in *Alexander*[90] stated that section 269.57(1) of the Wisconsin Statutes was a remedial statute which should be liberally construed while section 325.21 was to be strictly construed. The court cited, as its authority, *Culligan, Inc. v. Rheaume*,[91] and *Prudential Ins. Co. v. Kozlowski*.[92]

In the *Alexander* case it was contended that section 325.21, relating to the physician-patient privilege, was controlling over any right of inspection which might be acquired under section 269.57(1). The Wisconsin Supreme Court rejected the contention and held that the physician's exemption from disclosure should, in reason, be limited to such disclosures as would injure the patient's feelings or reputation. The court held that Mrs. Alexander, the plaintiff, was compelled under section 269.57(1) to produce a consulting doctor's medical report for inspection by the defendant. In this case, it appeared that Mrs. Alexander had signed a consent under section 325.21 for the inspection of hospital and medical records. The consent was directed to Drs. Pearson and Suckle, St. Clare's Hospital and St. Mary's Ringling Hospital. During the examination of Dr. Pearson's records, the defendant's counsel learned that Dr. Suckle's report had been removed. The trial court held that the defendant was entitled to inspect the Suckle report and the Wisconsin Supreme Court agreed.

There is no logical or practical reason why the filing of the complaint in a personal injury action should not be equivalent to the signing of a consent to inspect medical records. The hospital records are not privileged as the court held in *Leusink v .O'Donnell*,[93] and *Thompson v.*

[87] 196 Wis. 29, 219 N.W. 448 (1928).
[88] 25 Wis. 2d 623, 131 N.W. 2d 373 (1964).
[89] Cretney v. Woodmen Accident Co., *supra* note 87 at 35, 36, cited in Alexander v. Farmers Mut. Automobile Ins. Co., *supra* note 88 at 628.
[90] *Supra* note 88.
[91] 268 Wis. 298, 67 N.W. 2d 279 (1954).
[92] 226 Wis. 641, 276 N.W. 300 (1937).
[93] 255 Wis. 627, 39 N.W. 2d 675 (1949).

Roberts.[94] The hospital records, thus subject to inspection, may relate not only to the incidents which gave rise to the suit but may also relate to conditions before the accident complained of.[95]

Hospital records contain diagnoses, operation reports, progress notes, records of drugs prescribed and nurse's notes. The hospital records disclose the names of the treating and examining doctors. At least to the extent outlined by the hospital records, the depositions of the doctors for discovery purposes under section 326.12 may be taken.[96] The plaintiff is amply protected with respect to such depositions by section 326.12(3) of the Wisconsin Statutes. Subsection (3) provides that upon motion seasonably made by a party or by the person to be examined, the court may order that the deposition shall not be taken or that certain matters shall not be inquired into and may enter any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression. Finally, the court has ample power under the provisions of section 269.65, the pre-trial procedure, to enter and enforce orders which will facilitate the defining of issues and providing for prompt and adequate preparation for trial.

How May Hospital Records Be Used

In *Zweifel v. Milwaukee Automobile Mut. Ins. Co.*,[97] it was contended that the trial court committed error in refusing to allow the jury to consider the hospital report of Rowley, the plaintiff's guest driver. The record contained the notation, "old healed fract of nose with septal deviation," under the heading of "Diagnosis." The trial court admitted the hospital record in evidence but refused to allow the report to go to the jury. In holding that the trial court did not commit error in such refusal, the court said:

> Whether or not an exhibit should be submitted to the jury is a matter within the discretion of the trial court. Although there might be situations where it is imperative that the jury have the opportunity to study a report, this was not such a case. Appellant was not seriously injured and the facts relating to his injury and treatment were fully brought out in the testimony.[98]

The court stated that section 327.25(2) permitted the introduction of hospital records except for portions which constituted a medical opinion or diagnosis.

There is presently a conflict in the statutes. Chapters 256 and 459 of the Laws of 1963 repealed and re-enacted section 327.25. As re-enacted, section 327.25 provides that hospital records may be introduced in evidence as business records, substantially as provided by section

[94] 269 Wis. 472, 69 N.W. 2d 482 (1955).
[95] *Supra* note 88.
[96] See State *ex rel* Reynolds v. Circuit Court, 15 Wis. 2d 311, 112 N.W. 2d 686 (1961); Jacobi v. Podevels, 23 Wis. 2d 152, 127 N.W. 2d 73 (1964).
[97] 28 Wis. 2d 249, 137 N.W. 2d 6 (1965).
[98] *Id.* at 260, 261; 137 N.W. 2d at 13.

1732 of Title 28, U.S. Code. By order of the Wisconsin Supreme Court, dated May 6, 1963, effective July 15, 1963, section 327.25(2) was amended to provide for the introduction in evidence, as business records, medical and hospital records. The statute applies only to entries made in medical or hospital records, if the entries relate to "treatment given or examination conducted." Statements made in the medical report or hospital records relating to anything except treatment given or examination conducted are inadmissable. This means that statements in relation to the manner in which an accident occurred, to give a frequent example, could be excluded from any medical or hospital records introduced in evidence.

The entries in medical and hospital records must be confined under the statute to treatment given or examination conducted in this state. This exclusionary provision would preclude the court from admitting into evidence, for example, medical records made in the Mayo Clinic or St. Mary's Hospital in Rochester, Minnesota.

There is a further aspect of the problem which could arise frequently. Does the statute permit the introduction in evidence of notes made by a doctor in his office to examination and treatment of the patient? In *Rupp v. Travelers Indemnity Co.*,[99] Milwaukee Circuit Court Judge Elmer Roller refused to admit hospital records and the office records of Dr. Frederick Krueger, who was deceased at the time of the trial. The hospital records sought to be introduced contained conclusions and opinions which were not identified by the doctors who made them. The office records of Dr. Krueger were made out principally in the doctor's handwriting, some of which were illegible even to his secretary. It is submitted that Judge Roller's decision properly disposed of the evidential issue presented. The *Rupp* case was cited with approval and followed by the court in *United States F. & G. Co. v. Milwaukee & S. T. Corp.*,[100] and in *Chapnitsky v. McClone.*[101]

There is an extended discussion of the admissibility of hospital records in the April, 1963 issue of the *Insurance Counsel Journal,* Volume 10, No. 2, Page 240, in which the *Rupp* case and two recent decision in the United States Court of Appeals for the Fourth Circuit, *Thomas v. Hogan,*[102] and *Kissinger v. Frankhouser,*[103] are analyzed by the author of this article.

Trial judges are concerned with questions of policy concerning the introduction of medical and hospital records. In *Zweifel v. Milwaukee Automobile Mut. Ins. Co.*,[104] as previously commented, the supreme court has held that whether medical and hospital records should be sub-

[99] 17 Wis. 2d 16, 115 N.W. 2d 612 (1962).
[100] 18 Wis. 2d 1, 117 N.W. 2d 708 (1962).
[101] 20 Wis. 2d 453, 122 N.W. 2d 400 (1963).
[102] 308 F. 2d 355 (1962).
[103] 308 F. 2d 348 (1962).
[104] *Supra* note 97.

mitted to the jury rests in the sound discretion of the trial court. It is hoped that Wisconsin trial judges and attorneys may find assistance in this article, in properly solving some of the questions which arise in personal injury cases. It is suggested that the court should, in every case, give careful consideration not only in the admission of the hospital records but particularly in permitting the records to go to the jury room. Many cases may readily be suggested where the sending of the medical and hospital records to the jury room would result in confusion. Questions of interpretation of the medical terms used continually perplex both the trial judges and the attorneys. The progress notes in many of the hospital records, without meticulous explanation, would be completely unintelligible to the jury. The hospital records contain records of medication. The bewildering array of narcotics, tranquilizers and drugs required for heart conditions would be incomprehensible to anyone unless he had access to a medical dictionary. High blood pressure, atherosclerosis and other diseases in the field of geriatrics must give one pause before submitting such abstruse matters to the jury in the form of medical and hospital records.

Finally, there are in many hospital records matters which might result in embarrassment and humiliation. Such a situation in a mild form appeared in *Huss v. Vande Hey.*[105] In this case it appeared that in connection with a Wassermann test, the question arose concerning the use of bismuth. The inference might be drawn that the plaintiff had venereal disease, particularly in connection with a pre-marital report of physical examination. Such matters which have no relevancy should certainly be excluded from jury consideration. In fact, in the *Huss*[106] case, the court held that a record of a pre-trial Wassermann test filed in the county clerk's office ought not to have been introduced in evidence. The court cited *Estate of Eannelli,*[107] *Voigt v. Voigt,*[108] and *Jacobson v. Bryan.*[109] These cases hold that statements of conclusions contained in official records are not admissible. Upon the authority of *Zweifel,*[110] the Wisconsin Supreme Court held the admission of the clerk's record was erroneous, but under the circumstances, not prejudicial.

Use of Demonstrative Evidence Including Charts, Models and Blackboards

In *Hernke v. Northern Ins. Co.,*[111] the trial court refused to permit the introduction in evidence of a chart of the muscles of the body and a model skeleton of a spinal column made out of plastic. The Wiscon-

[105] 29 Wis. 2d 34, 138 N.W. 2d 192 (1965).
[106] *Ibid.*
[107] 274 Wis. 193, 80 N.W. 2d 240 (1956).
[108] 22 Wis. 2d 573, 126 N.W. 2d 543 (1964).
[109] 244 Wis. 359, 12 N.W. 2d 789 (1944).
[110] *Supra* note 97.
[111] 20 Wis. 2d 352, 122 N.W. 2d 395 (1963).

sin Supreme Court held that whether or not demonstrative evidence is to be received rests largely in the discretion of the trial court and cited *Walker v. Baker,*[112] and *Gordon, Demonstrative Evidence,* 32 Wisconsin Bar Bulletin 11 (February, 1959). The court commented that many people learn and understand better with their eyes than they do with their ears and suggested that the alignment of bones and muscles is sufficiently obscure to the average juror as to make a visual demonstration helpful. The court concluded that it would have been preferable for the trial court to have permitted the use of the chart and skeleton.

In *Walker v. Baker,*[113] the trial court admitted photographs of the plaintiff to show his physical condition shortly after the accident. The supreme court suggested that it would have been better if the trial court had not included the photographs, especially the one showing the plaintiff's teeth with a wired jaw, as such photographs might tend to inflame the jury. Nevertheless, the supreme court held that the admission of the photographs was largely a question left to the discretion of the trial judge and that under the circumstances there was no abuse of discretion in admitting the photographs.

In *Bellart v. Martell,*[114] the supreme court held that there was no abuse of discretion by the trial court in permitting the plaintiff to show the amputation of the right hand two inches above the wrist and the amputation of the left leg well above the knee. The trial court, in this case, permitted the plaintiff to demonstrate the use of prosthetic devices which included a shoulder harness worn on the left shoulder used in controlling the hook on the prosthesis of the right arm.

In the category of demonstrative evidence, there is the blackboard and its proper use. In *Affett v. Milwaukee & S. T. Corp.,*[115] the court adopted the practice approved by the New Jersey court in *Botta v. Brunner.*[116] In that case the New Jersey court refused to permit the the plaintiff's attorney to argue to the jury on allowance for pain and suffering based on per diem amounts. The court did say that it found no objection to the use of a blackboard as an aid to illustrate or demonstrate the course of proper argumentation upon the hypotheses that what the ear may hear, the eye may see. The court stated that it was proper for plaintiff's counsel to state and argue the amount of future pain and suffering which he believed the evidence would fairly and reasonably sustain, but that the amount could not be referred to as the amount in the ad damnum clause. Although the ad damnum had no probative value and was no part of the evidence, the court did suggest

[112] 13 Wis. 2d 637, 109 N.W. 2d 499 (1961).
[113] *Ibid.*
[114] 28 Wis. 2d 686, 137 N.W. 2d 729 (1965).
[115] 11 Wis. 2d 604, 106 N.W. 2d 274 (1960).
[116] 26 N.J. 82, 138 A. 2d 713 (1958).

that counsel for both the plaintiff and the defendant may make an argumentative suggestion and summation from the evidence of a lump sum dollar amount for pain and suffering. The court forbade counsel from arguing the amount arrived at on the basis of a mathematical formula or on a per day, per month or on any other time-segment basis.

In *Halsted v. Kosnar,*[117] the court held that although there should be broad latitude regarding the lump sum which counsel may urge upon the jurors for pain and suffering, it did not follow that appeals to passion might be made in connection with damages.

In *Walker v. Baker,*[118] the court held that plaintiff's counsel was not acting improperly when in his final argument to the jury, he said, "I am asking you to consider $25,000." The *Walker*[119] case was cited with approval in *Halsted v. Kosnar,*[120] and *Doolittle v. Western States Mut. Ins. Co.,*[121]

It may be that either the court or counsel or both may desire to have a copy of the writing on the blackboard preserved as a part of the record. The proper method of taking care of the situation is to have the blackboard photographed but as the court said in *Affett,*[122] this should not be done in the presence of the jury. Experience has demonstrated that large sheets of paper which may be tacked to an easel are more satisfactory than the blackboard since the paper may be marked as an exhibit and thereby preserved as a part of the record.

Parenthetically, it should be remarked that section 270.202 of the Wisconsin Statutes regulates the use of photographs. The statute was referred to in connection with section 251.251(10) in *Keplin v. Hardware Mut. Casualty Co.,*[123] where the court did suggest that there must now be compliance with section 270.202.

What Medical Proof Is Necessary To Sustain A Verdict For Future Medical Attention, Future Permanent Disability And Future Pain And Suffering

In *Diemel v. Weirich,*[124] the court said:

> It is a rare personal-injury case indeed in which the injured party at time of trial does not claim to have some residual pain from the accident. Not being a medical expert, such witness is incompetent to express an opinion as to how long such pain is going to continue in the future. The members of juries also being laymen should not be permitted to speculate how long, in their opinion, they think such pain will continue in the future, and fix

[117] 18 Wis. 2d 348, 118 N.W. 2d 864 (1963).
[118] *Supra* note 112.
[119] *Ibid.*
[120] 18 Wis. 2d 348, 118 N.W. 2d 864 (1963).
[121] 24 Wis. 2d 135, 128 N.W. 2d 403 (1964).
[122] *Supra* note 115.
[123] 24 Wis. 2d 319, 129 N.W. 2d 321 (1964).
[124] 264 Wis. 265, 58 N.W. 2d 651 (1953).

> damages therefor accordingly. Only a medical expert is qualified to express an opinion to a medical certainty, or based on medical probabilities (not mere possibilities), as to whether the pain will continue in the future, and, if so, for how long a period it will so continue. In the absence of such expert testimony . . . the jury should be instructed that no damages may be allowed for future pain and suffering.[125]

Despite the clarity with which the court has annunciated the rule, the propriety of an allowance for future disability and future pain and suffering has arisen with great frequency. In *Huss v. Vande Hey,* [126] none of the defendants' medical witnesses expressed any opinion relating to permanency or to future pain and suffering. The plaintiff's physician had testified that as a result of the accident, the plaintiff sustained injuries to the arthritic spurs on his spine, injuries to his back and chest muscles and contusions of the hand and knee. When asked about his prognosis, the plaintiff's doctor testified that the prognosis was guarded, that the plaintiff's condition could be aggravated by accidents, over-work, by sudden twists or falls, or any of these things and that he could have pain again. The defendants requested the court to instruct the jury that no damage could be awarded for permanent disability. The trial court refused such request and instructed the jury that they could make an allowance for future pain and suffering if they were convinced by the greater weight of the credible evidence that the plaintiff was reasonably certain to suffer in the future as a natural consequence of the injury he had sustained. The defendants urged that the record was devoid of medical proof that the plaintiff's injuries would be permanent, but, the trial court declined to instruct the jury regarding the absence of any permanent injury.

The supreme court commented in *Diemel v. Weirich,*[127] and held that with regard to an injury which was subjective in character, it was necessary that damages for a permanent injury or for future pain and suffering be supported by the opinion of a medical expert based on medical certainty or medical probability. The court in *Huss* cited with approval the language of the *Diemel* case, where the court said: "In the absence of such expert testimony . . . the jury should be instructed that no damages may be allowed for future pain and suffering."[128]

The court, in *Huss,* further commented that the *Diemel* rule had been followed in a number of subsequent cases. In *Rogers v. Adams,*[129] the court held that before an award could be made for future pain, suffering, and disability, there must be competent medical testimony to support the same.

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[125] *Id.* at 268, 269, 58 N.W. 2d at 652.
[126] *Supra* note 105.
[127] *Supra* note 124.
[128] *Id.* at 268, 58 N.W. 2d at 653.
[129] 19 Wis. 2d 141, 119 N.W. 2d 349 (1963).

In *Lucas v. State Farm Mut. Automobile Ins. Co.,* [130] the court said:

> In analyzing the testimony as to the existence of any permanency of the injury or the likelihood that the injured person will endure future pain and suffering before recovery may be allowed therefor, there should be competent objective medical findings and the unsupported subjective statements of the injured party are not sufficient.[131]

In *Powers v. Allstate Ins. Co.,*[132] the court followed the *Diemel* case and pointed out that where an injury is subjective in character and of such nature that a layman cannot, with reasonable certainty, know whether or not there will be future pain and suffering, there must be competent expert opinion testimony bearing on the permanency of such injury or the likelihood that the injured person will endure future pain and suffering before recovery may be allowed therefor. The unsupported subjective statements of the injured party, who is not a medical expert, is not sufficient to support a finding of permanency.

In *Peterson v. Western Casualty & Surety Co.,*[133] the court cited and followed *Diemel* and concluded that the jury's award was not supported by evidence of impairment of earning capacity or pain and suffering which elapsed between the injury and the trial. Some unknown portion was based upon speculation as to the future; but, it was impossible to determine how much was so attributed. In *Huss v Vande Hey,*[134] the jury verdict allowed $4,750, "for personal injuries." There was no delineation of the component parts of the jury's figure. The court stated that it was impossible to determine whether any or some substantial part of the figure found by the jury represented an allowance for future pain and suffering. The court, therefore, followed the course outlined in *Nelson v. Boulay Brothers Co.,*[135] where the court said:

> Since the verdict included in the answer to the damage question an item which was legally erroneous, we conclude that there must be a new trial on the question of damages. While this court in Speals v. Milwaukee & S. T. Corp. (1963), 21 Wis. 2d 635, . . . has extended the rule of Powers v. Allstate Ins. Co. (1960) 10 Wis. 2d 78 . . . to permit its use in cases in which the prejudicial error was confined to damages, we believe that in the instant case the wiser course is to order a retrial of the damage issue.[136]

The court disposed of the appeal in *Huss* by granting a new trial on all issues in the case because there was insufficient medical evidence

[130] 17 Wis. 2d 568, 117 N.W. 2d 660 (1962).
[131] *Id.* at 572, 117 N.W. 2d at 662.
[132] *Supra* note 49.
[133] 5 Wis. 2d 535, 93 N.W. 2d 433 (1958).
[134] *Supra* note 105.
[135] 27 Wis. 2d 637, 135 N.W. 2d 254 (1965).
[136] *Id.* at 644, 135 N.W. 2d at 257.

to support a verdict in which the jury may have included an allowance for future pain and suffering. The court suggested that if the medical proof offered in the new trial was no different from that presented in the case at bar, the trial court should instruct the jury that no award might be made for permanent injury or for future pain and suffering.

In *Sawdey v. Schwenk*,[137] the court held that in order to recover for future medical expense there must be competent medical evidence in the record; and, in *Bleyer v. Gross*,[138] the court held that competent medical testimony is necessary to support a recovery for future medical expense.[139]

RECOVERY OF MEDICAL EXPENSES BY HUSBAND AND WIFE

In *Jewell v. Schmidt*,[140] the court held that the early rule was that it was the husband's absolute duty to pay for medical services to his wife and that this duty could not be altered even where the wife agreed to pay the bills, recognized them as her personal debt and, in fact, made payments on them from time to time from her separate estate. The absolute bar, however, has been softened by subsequent decisions based on statutes extending the legal rights of married women. The present rule is that a married woman may contract for medical services in her own right, but in the absence of the establishment of an express contract between the wife and the person rendering the services, the husband and not the wife is the person liable for such expenses and the one entitled to recover for them.

In *Seifert v. Milwaukee & S. T. Corp.*,[141] Dr. Hansher was the wife's doctor before and during marriage. The doctor looked to the plaintiff for his payment. In the emergency period following the plaintiff's injury, Dr. Hansher engaged a plastic surgeon and an orthopedic specialist. There was no discussion at the time who would pay the specialist's bills. The trial court refused to permit the plaintiff to recover for the specialist's bills, but the supreme court held that the trial court erred in not allowing the bills.

In *Fee v. Heritage Mut. Ins. Co.*,[142] the court held that a husband's marital obligation includes the duty to pay for medical care furnished to his wife. When the husband has paid or incurred sums for the care of his wife, he may recover them as damages from one who is legally responsible for the injury which made them necessary, but the husband's marital obligation is not an obligation to pay such sums as damages.

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[137] *Supra* note 67.
[138] 19 Wis. 2d 305, 120 N.W. 2d 156 (1963).
[139] To the same effect, see Crye v. Mueller, 7 Wis. 2d 182, 96 N.W. 2d 520 (1959) and Borowske v. Integrity Mut. Ins. Co., 20 Wis. 2d 93, 121 N.W. 2d 287 (1963).
[140] 1 Wis. 2d 241, 83 N.W. 2d 487 (1957).
[141] 4 Wis. 2d 623, 91 N.W. 2d 236 (1958).
[142] 17 Wis. 2d 364, 117 N.W. 2d 269 (1962).

In *Dwyer v. Jackson Co.*, [143] the court followed the decision in *Jewell v. Schmidt*,[144] and held that since there was no evidence of a contract between the injured wife and the doctor who treated her, she could not recover such medical expense in her action. The court distinguished *Seifert v. Milwaukee & S. T. Corp.*,[145] upon the ground that one doctor had been the wife's doctor before the accident and before her marriage and had always been paid by her. The other two doctors were specialists called in by the first doctor immediately after the accident when the plaintiff was in no condition to make a contract. It was held that by later actions the wife ratified and approved her doctor's act.

Damages For Physical Therapy Treatment

In *Huss v. Vande Hey*,[146] the defendant contended that a plaintiff could not recover the cost of physical therapy treatments which were administered by a doctor's nurse in the absence of the doctor. Section 147.185(1)(b) of the Wisconsin Statutes provides that a person may not perform physiotherapy unless licensed by the Wisconsin State Board of Medical Examiners, nor unless he practices under prescription and the direct supervision of a person licensed to practice medicine and surgery. The court held that recovery for the physiotherapy expense could be had. The court suggested that regardless of whether the medical doctor was physically present or absent at the time the physical therapy was rendered by a nurse in his office, the doctor was fully responsible for her conduct under the doctrine of *respondeat superior*. Since it was undisputed that the services were performed by a nurse at the direction of and as an aid to a licensed medical doctor, the supreme court rejected the defendant's argument that the doctor's charge for such services was unlawful.

Time For Completion Of Medical Examinations

The County Board of Judges of Milwaukee County have adopted Rule 11, as amended December 31, 1963, entitled "Medical Examinations," which reads as follows:

> All medical examinations shall be completed no later than 10 days before the date for which the case has been set for trial; except that, upon application, the court may permit such examination to be made before the close of testimony at the trial.

The rule is a salutary one and should be strictly enforced. The validity of such a rule was inferentially upheld in *Plesko v. Milwaukee*.[147] In

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[143] 20 Wis. 2d 318, 121 N.W. 2d 881 (1963).
[144] *Supra* note 140.
[145] *Supra* note 141.
[146] *Supra* note 105.
[147] 19 Wis. 2d 210, 120 N.W. 2d 130 (1963).

that case Dr. Montgomery's testimony concerning the plaintiff's report of subjective symptoms on the day before trial was inadmissible "because of the report's proximity to trial." It is suggested that the completion dates for medical examinations might well be made by the court at a pre-trial as provided by section 269.65 of the Wisconsin Statutes. If the medical examinations are concluded in ample time before the date set for trial and if the use of medical and hospital records have been properly outlined at a pre-trial, the trial itself will be appreciably expedited.

Recovery For Traumatic Neurosis

The earliest case involving the recovery of damages resulting from a traumatic neurosis was *Heindel v. Wisconsin T., L. H., & P. Co.*,[148] decided by the supreme court in April, 1919. The evidence in that case disclosed that the plaintiff, a young girl 21 years of age, had been injured in a collision between two automobiles. The plaintiff claimed that by reason of the shock and fright suffered in the collision, she had sustained a traumatic neurosis which, according to medical testimony, was permanent. Without any discussion, the court sustained a judgment in favor of the plaintiff.

In *Landrath v. Allstate Ins. Co.*,[149] decided in 1951, Mrs. Landrath brought an action as a guest to recover damages resulting from a collision of two automobiles. The only objective evidence of injury consisted in a small scar on the plaintiff's chin which one of the doctors described as a little bump. There was medical evidence which established that Mrs. Landrath suffered from a traumatic neurosis due to the injury. One of the doctors testified that traumatic neurosis is a condition which often exists when someone is making a claim against another arising out of an accident. In some cases where this condition exists after the person suffering from the ailment obtains a settlement or the case is disposed of, the condition disappears. There was medical testimony, however, that the plaintiff was not malingering. The court permitted recovery by the plaintiff but found the damages awarded by the jury excessive and gave to the defendant the option to have judgment entered for a fixed amount, and in the event the defendant refused to permit the entry of judgment, a new trial would be awarded.

In *Sundquist v. Madison Rys. Co.*,[150] the plaintiff was sitting in the rear seat of an automobile waiting in a line of cars for a traffic signal to change when the automobile in which she was a passenger was struck from the rear by a streetcar operated by the defendant railway company. The plaintiff saw the streetcar approaching and became hysterical when the crash came. She sustained no injuries. Approximately eight

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[148] 169 Wis. 181, 171 N.W. 938 (1919).
[149] 259 Wis. 248, 48 N.W. 2d 485 (1951).
[150] 197 Wis. 83, 221 N.W. 392 (1928).

days after the accident, while the automobile in which the plaintiff was a passenger was standing near the curb and out of the path of a streetcar at Olympia, Washington, a streetcar approached the car and clanged its bell. The plaintiff immediately became hysterical, later fainted and during the following night one side of her body became paralyzed. Although there was the usual disagreement among the doctors, there was credible medical evidence to sustain a finding that the paralysis of the plaintiff followed naturally and directly from the shock which she sustained when the automobile in which she was riding was struck by the defendant's streetcar. The trial court entered judgment for the plaintiff and, upon appeal, the judgment was sustained.

The court, in *Sundquist*,[151] made the following statement: "It is not essential to liability that there be proof of any bodily physical injury in case physical disability results naturally and directly from extreme fright or shock."[152]

In *Waube v. Warrington*,[153] Susie Waube witnessed a collision between an automobile operated by the defendant, Amber Rose Warrington, and Dolores Waube, the infant daughter of Susie Waube. As a result of the collision, Dolores Waube was killed. As a result of the accident, Susie Waube became hysterical through fright, shock and extensive sudden emotional disturbances, and in approximately two weeks after the episode, Susie Waube died. The question presented was whether the mother of a child who, although not put in peril or fear of physical impact, sustains the shock of witnessing the negligent killing of her child, may recover for physical injuries caused by such fright or shock. The court, after a detailed analysis of the authorities, concluded that the mother could not recover.

In *Klassa v. Milwaukee Gas Light Co.*,[154] the question arose whether Mrs. Klassa or Mrs. Lepianka sustained any injuries for which recovery of damages were sought solely upon the basis of the result of shock and fright caused by the apprehension for the safety of the two Klassa sons who were in the basement of the plaintiff's home at the time an explosion occurred. The shock and fright did not take place at the time of the explosion, but later, when both women were out of the house. They at this time discovered that the Klassa sons were in the basement. The court held that the decision in the *Waube* case was grounded on sound consideration of public policy and should be adhered to.

In *Colla v. Mandella*,[155] Mandella negligently parked a truck which rolled down a hill and crashed into Colla's house near the place where

[151] *Ibid.*
[152] 197 Wis. at 86, 221 N.W. at 393.
[153] 216 Wis. 603, 258 N.W. 497 (1935).
[154] 273 Wis. 176, 77 N.W. 2d 397 (1956).
[155] 1 Wis. 2d 594, 85 N.W. 2d 345 (1957).

he was sleeping. The crash made a loud noise which frightened Colla. Colla was 63 years old at the time and was suffering from high blood pressure and a mild heart condition, for which he was being treated by a doctor, but which was not disabling. At the time of the accident, he was taking a nap in the bedroom. Two or three minutes after the crash, Colla came out of the house, appeared frightened, was white and shaking and holding his hand over his heart and talking with a trembling voice. The evening following the accident Colla could not breathe and the next day the doctor found his heart condition to be worse. Colla died of heart failure ten days after the accident. The attending physician testified that the excitement from the accident was a sufficient cause to throw Colla into heart failure and that the accident precipitated the heart failure and caused attendant pain and suffering although the heart failure could have resulted without a scare. There was no evidence that the noise or shock of the accident would have been likely to cause any harm to a person in normal good health. The court held that there could be recovery on account of Colla's death, upon the authority of *Sunquist v. Madison Rys. Co.*,[156] *Pankopf v. Hinkley*,[157] and *Waube v Warrington*.[158]

In *Johnson v. Industrial Comm.*,[159] the court held that traumatic neurosis or hysteria caused by an industrial accident was a compensable injury.

In *Gallagher v. Industrial Comm.*, [160] it was contended that the award of the Wisconsin Industrial Commission could be sustained upon the evidence relating to conversion hysteria. One of the doctors who testified did not use the general term, *traumatic neurosis,* but the specific term, *conversion hysteria.* The court cited a number of decisions, from other jurisdictions, holding that *conversion hysteria,* also known as *conversion reaction,* has been held to be compensable. The court cited 1 LARSON ON WORKMEN'S COMPENSATION LAW, 619, section 42.24, (1952). where the author states that compensation neurosis must be distinguished from conscious malingering. The court said that assuming, but not deciding compensation neurosis was compensable, there was a practical problem in compensating for conversion hysteria or conversion reaction. Upon the medical testimony contained in the record, the appellant's mental illness was temporary in its nature. One of the doctors testified that the conversion hysteria would end one year after the payment.

It was contended in *Gallagher*,[161] that the *Johnson*[162] case was con-

[156] *Supra* note 150.
[157] 141 Wis. 146, 123 N.W. 625 (1909).
[158] *Supra* note 153.
[159] *Supra* note 70.
[160] 9 Wis. 2d 361, 101 N.W. 2d 72 (1960).
[161] *Ibid.*
[162] *Supra* note 70.

trolling. The court distinguished *Johnson* upon the ground that it did not involve compensation neurosis or conversion hysteria. The traumatic neurosis there involved was of such a nature and the medical testimony was to the effect that the neurosis could be cured by psychiatric treatments. In the *Gallagher* case there was no medical testimony that the type of neurosis claimed by the applicant could be cured by any psychiatric therapy.

McMahon v. Bergeson[163] has been characterized by a later decision of the supreme court as presenting "rather bizzare facts."[164] In *McMahon,* the defendant, Bergeson, drove through a red light and struck the side of the plaintiff's car. Before the plaintiff's car came to rest, he fell or was thrown from his car and landed on his feet. One of the doctors testified that as a result of the collision the plaintiff, McMahon, sustained a traumatic neurosis; an anxiety reaction precipitated by a trauma. The neurosis was triggered by the sight of Mr. and Mrs. Bergeson at the scene of the accident who, at the time, reminded McMahon of his own father and mother. McMahon identified Bergeson with his father against whom he had a hatred complex. The court arrived at the following conclusion:

> The testimony of Dr. Smith establishes that the neurosis did not have its origin in the brain concussion, but was due to the plaintiff's having seen Bergeson immediately after the accident lying on the pavement with his wife standing alongside. This requires that the same rule of damages be applied as in the cases in which recovery is allowed for emotional distress alone. Such rule precludes recovery in an action grounded upon negligence for emotional distress which is due to a pre-existing susceptibility to emotional disturbance not present in a normal individual, unless the actor had prior knowledge of such susceptibility.[165]

There was a dissenting opinion by Justice Fairchild. The opinion recites that the unusual elements involved in the case, including the plaintiff's emotional background and the resemblance of the Bergesons to his parents, did not constitute public policy grounds for denial of recovery. *Colla v. Mandella*[166] was cited for the proposition that far more serious physical injury to the plaintiff would not be an extraordinary result of an identical accident.

In *Riehl v. De Quaine,*[167] the physical injuries sustained by Mrs. Riehl in an automobile accident were moderate in nature and cleared up in a relatively short time. She contended, however, that she suffered from an incapacitating compensation neurosis, a type which was permanent in nature and was caused by the accident. The court reviewed

[163] 9 Wis. 2d 256, 101 N.W. 2d 63 (1960).
[164] See Riehl v. De Quaine, *supra* note 22.
[165] 9 Wis. 2d at 272, 101 N.W. 2d at 71.
[166] *Supra* note 155.
[167] *Supra* note 22.

some of the previous cases involving traumatic neurosis and stated the court was confident that a great majority of the bench and bar rightly assumed that damages for traumatic neurosis, when associated with physical injury, were recoverable in personal injury actions in Wisconsin. *McMahon v. Bergeson*[168] was cited to the point that it was there clearly implied that such was the law. The point in that case, upon which the majority and minority divided, was whether the impact of the accident had triggered the plaintiff's neurosis. The majority held that the impact did not but that the defendant driver's tortious conduct had placed the plaintiff in a position where a subsequent event did trigger it and because of this factor, there could be no recovery for the neurosis which would not have been produced in a normal individual absent a showing that the defendant driver knew of such susceptibility. The court referred to at least one instance where it had been mistakenly assumed that the majority opinion in *McMahon* would permit no recovery for traumatic neurosis in automobile negligence cases if the plaintiff was more susceptible to a neurosis than the normal individual. The court disavowed such a conclusion. It characterized the *McMahon* holding as not to be extended beyond "the peculiar and rather bizzare facts there presented."[169]

There was conflicting medical testimony in *McMahon* with respect to the question of whether the plaintiff had a traumatic neurosis. The award of damages made by the jury indicated that the plaintiff's neurosis was not caused by the accident. The court held such awards not inadequate if the element of neurosis was eliminated.

Recovery In Cancer Case

Seymour v. Industrial Comm.[170] was a case where the Wisconsin Industrial Commission awarded compensation for aggravation of a chordoma at L 4. The applicant fell on his buttocks twice within the period of a week. Six months later a laminectomy was performed, but no herniated disc was discovered. Nine months after the operation a second laminectomy was performed on L4 and a chordoma was found which was partially removed. Seven months after the second operation, there was a third operation which showed the tumor had advanced appreciably. Three doctors, including a doctor who performed the second and third operations, testified that the two falls aggravated the tumor. Dr. Enzer, a pathologist at Mt. Sinai Hospital in Milwaukee since 1927, testified that the falls had nothing to do with the disability of the applicant which due to a malignant tumor of the spinal cord; that there was no basis for relating a single trauma to the cause, development or be-

[168] *Supra* note 163.
[169] 24 Wis. 2d at 30, 127 N.W. 2d at 792.
[170] 25 Wis. 2d 482, 131 N.W. 2d 323 (1964).

havior of a malignant tumor; that the statistics of the two World Wars disproved that trauma causes or aggravates cancer; and that motor vehicle accident statistics are to the same effect. He also testified that there was no evidence that the trauma or surgery had initiated a development or aggravation of a tumor; that in order for a trauma to be effective to aggravate a tumor it should be proven to have applied itself to the tissue exactly where the tumor arose. The Commission, as a finding of fact, found:

> . . . that although his tumor pre-existed his injury of March 9 and March 16, it was asymptomatic and was not disabling; that the injury of such dates provoked a reaction and stimulated the development of the tumor, which had been quiescent; . . .[171]

The court cited *Puhl v. Milwaukee Automobile Ins. Co.*,[172] where recovery was denied for injuries which were alleged to have produced a mongoloid infant. In *Seymour*,[173] the trial judge felt the testimony was speculative and conjectural but stated that he could not substitute his opinion for that of the medical experts. The supreme court felt the same way, but it too believed that it could not disturb the findings of the Industrial Commission. The cross-examination of the applicant's experts disclosed that his opinion "gets down to a sequence of events," that "trauma aggravated the tumor and facilitated its extension," meaning that the trauma permitted the tumor's extension beyond the site of confinement by providing routes and avenues which, prior to the occurrence of the trauma, "were not to its avail," that the avenues of extension were provided "when the trauma caused an inflammatory reaction in the tissues adjacent to and extending into the tumor," and that the presence of scar tissue formation in the microscope slides confirmed that the "inflammatory reaction had occurred." One of the doctors based his opinion to a reasonable medical certainty that the trauma aggravated a pre-existing chordoma by causing disruption of the tissues and by creating spaces and avenues of extension so that the chordoma would spread, but "that there was no clinical evidence of the trauma having provided avenues of extension except the chronological sequence of events."[174]

In reality, the court in *Seymour* relied upon 1 LARSON, LAW OF WORKMEN'S COMPENSATION, page 192.39, section 12.20, where the author states that aggravating a disease is exemplified by cancer cases in which the malignant growth is ruptured or spread by occupational exertions or in which its development is hastened by strains, impacts, or accidents in the course of employment.

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[171] *Id.* at 485, 131 N.W. 2d at 324.
[172] *Supra* note 72.
[173] *Supra* note 170.
[174] 25 Wis. 2d at 488, 489, 131 N.W. 2d at 326.

The *Seymour* case might be contrasted with *Kablitz v. Hoeft.*[175] In this case the plaintiff was injured in an automobile accident. In 1935, he had osteomyelitis from a gun-shot wound. He was hospitalized and worked only part-time from 1936 to 1940. In 1940 there was a recurrence of the osteomyelitis and again, hospitalization. In 1946 or 1947 there was again a recurrence of the osteomyelitis, but no hospitalization. Two or three days after the accident of October 18, 1961, the osteomyelitis again recurred. There was medical evidence that the 1961 flare-up was caused by the trauma of the accident. The court was influenced by the fact that for fourteen years there was no flare-up, while there was a flare-up shortly after the accident.

There was an interesting procedural point presented in the *Kablitz*[176] case which involved the calling of the defendant's doctor adversely by the plaintiff. At the request of the defendant's counsel, Dr. Alfred Kritter, an orthopedic surgeon, examined Kablitz, sent his report to the attorneys and was paid by Farmers Mutual. The trial court considered him to be an agent of Farmers Mutual under section 325.14 and permitted the plaintiff to call him adversely. The supreme court held that the trial court committed error; that Dr. Kritter was an independent contractor and not an agent of the insurance company. The plaintiff contended that unless he was able to call Dr. Kritter adversely, under section 325.14, the only way he would be able to learn the results of the examination would be to call the doctor on direct and take the chances that go with making him his own witness. The court replied to the plaintiff's contention as follows:

> Respondent overlooks the fact that a discovery examination may be conducted of the doctor (even though not an agent) prior to trial under sec. 326.12, and that the defendant may be compelled to supply the plaintiff with a copy of the doctor's report under the provisions of sec. 269.57.[177]

Recovery For Emotional Harm

Alsteen v. Gehl [178] was a case in which Mrs. Alsteen attempted to recover from a contractor damages resulting from emotional distress caused by misconduct of the contractor in the performance of a contract to re-side the plaintiff's house. The court said it had held that a person might be required to compensate another for emotional distress which attended physical harm intentionally or negligently inflicted upon the injured party and that it had also permitted recovery for severe emotional harm if the psychological disturbance was a response to an intentional invasion of an independent legally protected interest. The court

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[175] 25 Wis. 2d 518, 131 N.W. 2d 346 (1964).
[176] *Ibid.*
[177] 25 Wis. 2d at 522, 131 N.W. 2d at 348, 349.
[178] 21 Wis. 2d 349, 124 N.W. 2d 312 (1963).

gave, as an example, a person who had been libeled might recover damages for the emotional distress attending destruction of a good reputation. The court extended the rule in the following language:

> We now conclude that a person may recover damages for severe emotional stress alone, if such psychological condition is the result of the extreme and outrageous conduct of another and if such course of conduct was undertaken by the defendant for the purpose of inflicting psychological harm upon the injured person.[179]

USE OF A SIGNED STATEMENT FOR IMPEACHMENT PURPOSES

In *Musha v. United States Fidelity & Guaranty Co.*,[180] the court held that the offered statement was admissible. The opinion, however, in distinguishing some cases cited against the admissibility of the statement, recited:

> These cases are distinguishable. In all of them the witness denied the truthfulness of the statement which was being used for impeachment. When the witness unequivocally denies that the statement accurately represents what he said, such signed statement is inadmissible for impeachment until the person who transcribed or took down the statement or some other person having knowledge of the facts is sworn as a witness and testifies that the statement was a true acount of what the declarant said. For the purpose of impeachment, such procedure is necessary in order to lay a proper foundation for the admission of such disputed statement.[181]

In *Jensen v. Heritage Mut. Ins. Co.*,[182] the court, after referring to the foregoing citation, said:

> While the weight of authority may support this statement, further consideration of the problem has caused us to doubt its soundness. Some authorities hold that, if the party signing the statement, which is offered as an admission, or for impeachment purposes, admits that the signature subscribed thereto is his, such signature should be sufficient authentication for admitting the statement . . . It would seem both reasonable and logical that, if during the cross-examination of a witness he is shown a conflicting statement that purports to bear his signature and he admits it is his signature, this should be sufficient authentication to justify its admission into evidence. It would then be open to the witness to offer any explanation he may have as to why he should not be bound by the statement, such as not having read it when he signed it, or that the party transcribing it had incorrectly recorded what the witness had said.[183]

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[179] *Id.* at 356, 357, 124 N.W. 2d at 316.
[180] 10 Wis. 2d 176, 102 N.W. 2d 243 (1960).
[181] *Id.* at 182, 102 N.W. 2d at 247.
[182] 23 Wis. 2d 344, 127 N.W. 2d 228 (1964).
[183] *Id.* at 351, 352, 127 N.W. 2d at 232.

In *Mack v. Decker*,[184] during cross-examination, Patricia Mack was shown a written statement purporting to give her version of the accident. The statement consisted of one page and a portion of a second page, both of which were subscribed, "Patricia Mack." Miss Mack was asked if the signatures were hers and she admitted that they were. An attempt was then made to read a portion of the written statement, but the trial court sustained an objection to the appellant's counsel reading from the statement in questioning the witness. At the conclusion of the cross-examination, appellants' counsel offered the statement in evidence, but the trial court excluded it. It appeared that at the time Miss Mack signed the statement, she was confined in a hospital where she was given sedatives for pain. The excluded statement contradicted Miss Mack's testimony given at the trial. The supreme court held that the admissibility of the statement was governed by *Jensen v. Heritage Mut. Ins. Co.*,[185] and that the two signatures on the statement which, according to Miss Mack, were her signatures, constituted sufficient authentication to entitle the statement to be admitted. Miss Mack's testimony that she could not recall giving or reading the statement and the conflicting evidence whether she was under sedatives at the time she signed it went to the weight to be accorded the statement, not its admissibility. It was significant to note that the hospital records disclosed the administration of sedatives before 8:15 A.M. and that at 11:00 A.M., the nurse had noted that Mis Mack was writing letters and at 2:00 P.M., she was visiting. At 3:00 P.M. the notation in the hospital record was, "comfortable day." The statements were signed in the afternoon.

MISCELLANEOUS

There must be competent medical evidence to sustain a wage loss;[186] but the jury can determine for itself, whether a scar is disfiguring.[187]

An opinion given in response to a hypothetical question has probative value only when it is based upon premises satisfactorily proved in the record.[188] A hypothetical question need only state the facts required to allow the expert to provide a correct answer on the theory advocated by the questioner's side of the case.[189]

A plaintiff can testify to his pain and suffering up to the date of the trial.[190]

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[184] 24 Wis. 2d 219, 128 N.W. 2d 455 (1964).
[185] *Supra* note 182.
[186] Mixis v. Wisconsin Public Service Co., 26 Wis. 2d 488, 132 N.W. 2d 769 (1965) and Bradford v. Milwaukee & S. T. Co., 25 Wis. 2d 161, 130 N.W. 2d 282 (1964).
[187] Sennott v. Seeber, 6 Wis. 2d 590, 95 N.W. 2d 269 (1959).
[188] Mass. B. & Ins. Co. v. Industrial Comm., 8 Wis. 2d 606, 99 N.W. 2d 809 (1959); Franckowiak v. Industrial Comm., 12 Wis. 2d 85, 106 N.W. 2d 51 (1960); Theisen v. Industrial Comm., 8 Wis. 2d 144, 98 N.W. 2d 446 (1959).
[189] Sharp v. Milwaukee & S. T. Co., 18 Wis. 2d 467, 118 N.W. 2d 905 (1963).
[190] Bethke v. Duwe, 256 Wis. 378, 41 N.W. 2d 277 (1950); Sennott v. Seeber,

The jury has the right to disbelieve the uncontradicted testimony of a witness if it is against reasonable probabilities.[191]

Trial practice is considered in *Gauthier v. State*.[192] In that case, which was a criminal case, the complainant was permitted to testify from notes which she had prepared almost three years after the alleged offenses took place and about three months before the trial. She testified that she wrote the notes after the District Attorney asked her to write down what she remembered and what she could recall three years after the incident occurred. The testimony revealed the witness' own recollection which was the basis of the notes and which was refreshed by them. The court, upon the authority of 3 WIGMORE, EVIDENCE, (3d ed.), page 10, section 761 and other authorities, concluded that it was perfectly proper for the complainant to testify from the notes that she had prepared. The court cited *Smith v. State*,[193] where the court said:

> After two years time it was natural for anyone when they know they are going to be put on the witness stand to sit down and think about the matter and jot down notes before they got on the witness stand so that they could refresh their recollection from them.[194]

In many instances, particularly those involving treatment by doctors and time spent in the hospital, the taking of the testimony could be expedited without any danger of fabrication and without infringing upon the right of cross-examination.

CONCLUSION

The population explosion, the progress made in the arts and sciences, particularly in relation to atomic energy and outer space, has afforded us a glimpse of the problems which will arise in personal injury litigation in the next decade. Despite the progress which has been made the major problem remains the same. The statement of Heraclitus of Ephesus, quoted by Joseph W. Planck, in 'Producing Great Lawyers: Jurisprudence and Legal Philosophy," 44 *American Bar Association Journal*, 327, 328, is as true today as it was 2,500 years ago:

> The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license.

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6 Wis. 2d 590, 95 N.W. 2d 269 (1959); Kincannon v. National Indemnity Co., 5 Wis. 2d 231, 92 N.W. 2d 884 (1958).

191 Foellmi v. Smith, 15 Wis. 2d 274, 112 N.W. 2d 712 (1961); Pagel v. Holewinski, 11 Wis. 2d 634, 106 N.W. 2d 425 (1960); Lubner v. Peerless Ins. Co., 19 Wis. 2d 364, 120 N.W. 2d 54 (1963); Kuzel v. State Farm Mut. Automobile Ins. Co., 20 Wis. 2d 558, 123 N.W. 2d 470 (1963).

192 28 Wis. 2d 412, 137 N.W. 2d 101 (1965).

193 205 Tenn. 502, 327 S.W. 2d 308 (1959).

194 *Id.* at 540, 327 S.W. 2d at 325.

Perhaps Mr. Justice Cardozo, has provided an answer when he said in "Growth of the Law," page 20:

> The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have the principle of growth.

It is hoped that this article may assist in the solution of some of the problems which lie ahead.